



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 25, 2004

Ms. Laura Garza Jimenez  
Nueces County Attorney  
County of Nueces  
901 Leopard, Room 207  
Corpus Christi, Texas 78401-3680

OR2004-9092

Dear Ms. Jimenez:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 211517.

The Nueces County Sheriff's Department (the "department") received a request for correspondence received from all applicants who applied for a specified position within the department. You claim that the requested information is excepted from disclosure under sections 552.103 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The department must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

You state, and the request itself reflects, that the requestor is a sergeant within the department who indicates that he plans to file a grievance with the Nueces County Civil Service Commission (the "commission") concerning the position announcement. This office has held that "litigation" within section 552.103 includes contested cases conducted in a quasi-judicial forum. *See, e.g.*, Open Records Decision Nos. 474 (1987), 368 (1983), 336, 301 (1982). For instance, this office has held that cases conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, are "litigation" for purposes of section 552.103. *See, e.g.*, Open Records Decision Nos. 588 (1991) (former State Board of Insurance proceeding), 301 (1982) (hearing before Public Utilities Commission). This office has focused on the following factors in determining whether an administrative proceeding is conducted in a quasi-judicial forum: 1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where a) discovery takes place, b) evidence is heard, c) factual questions are resolved, and d) a record is made; and 2) whether the proceeding is an adjudicative forum of first jurisdiction, *i.e.*, whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. *See* Open Records Decision No. 588 (1991).

Under section 158.032 of the Local Government Code, a sheriff's department in a county with a population of more than 500,000 may create a civil service system. Section 158.035 of the Local Government Code grants a sheriff's department civil service commission the power to adopt rules regarding disciplinary actions and grievance procedures, among other things. You state that a grievance before the commission is an

administrative appeal governed by chapter 158 of the Local Government Code. Further, you state that, pursuant to section 158.012 of the Local Government Code, an appeal of a commission decision is made to a district court under the substantial evidence rule. We note, however, that section 158.012 grants a county employee who, on a final decision by the commission, is *demoted, suspended, or removed* from the employee's position the right to appeal the decision by filing a petition in district court in the county within 30 days after the date of the decision. See Local Gov't Code § 158.012(a). In this instance, you do not indicate, and the documents do not reflect, that the requestor has been demoted, suspended or removed from his position with the department. Further, you have not provided this office with the commission's rules regarding its procedures concerning grievances filed by department employees, nor have you explained how these procedures amount to "litigation" for purposes of section 552.103. Therefore, we cannot determine whether such a proceeding is conducted in a quasi-judicial forum. Consequently, we have no basis on which to determine whether litigation was anticipated at the time of the request. Therefore, you may not withhold the requested documents under section 552.103 of the Government Code.

Next, we address the applicability of section 552.117 to the portions of the submitted information you have highlighted in yellow. Section 552.117(a)(2) excepts from disclosure the home addresses and telephone numbers, personal pager and cellular telephone numbers, social security numbers, and family member information of a peace officer regardless of whether the officer made an election under section 552.024.<sup>1</sup> Thus, pursuant to section 552.117(a)(2), the department must withhold the present and former home addresses and telephone numbers of any individual who is a licensed peace officer.

Finally, we note that the submitted information contains an e-mail address that is subject to section 552.137 of the Government Code. Section 552.137 makes certain e-mail addresses confidential. Section 552.137 provides:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

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<sup>1</sup>"Peace Officer" is defined by article 2.12 of the Code of Criminal Procedure.

- (1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;
  - (2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;
  - (3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or
  - (4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.
- (d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137(b). You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The department must, therefore, withhold e-mail address of the member of the public, which we have marked, under section 552.137.

In summary, the department must withhold the information you have highlighted in yellow under section 552.117(a)(2) of the Government Code. The department must withhold the e-mail address we have marked under section 552.137 of the Government Code. All remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

*Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

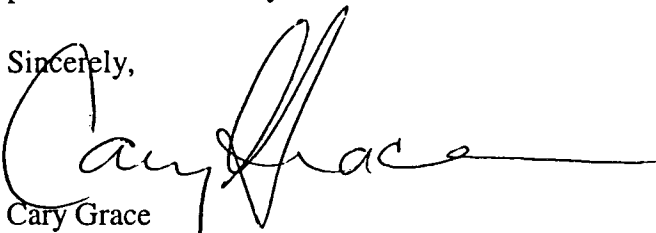
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cary Grace  
Assistant Attorney General  
Open Records Division

ECG/jev

Ref: ID# 211517

Enc. Submitted documents

c: Sgt. G.C. Ferguson  
c/o Ms. Laura Garza Jimenez  
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County of Nueces  
901 Leopard, Room 207  
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(w/o enclosures)